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IN THE

Supreme Court of the United States

October Term, 1957.

No. 63.

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN BEILAN,

Petitioner.

No. 165.

MAX LERNER,

Petitioner,

v.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON and DOUGLAS M. MOFFAT, Constituting the New York City Transit Authority.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that this Court grant rehearing of its decisions of June 30, 1958, affirming the judgments below.

REASONS FOR GRANTING REHEARING.

In the petition for certiorari in No. 63 and the jurisdictional statement in No. 165, petitioners requested this Court to grant hearings in these cases for the purpose of clarifying the import of certain of its previous decisions regarding the rights of public employees with respect to association and belief. With deference, we submit that the majority opinions in these cases have failed to achieve that clarification and further have introduced additional confusion on these important matters.

The previous decisions in *Garner v. Los Angeles Board of Public Works*, 341 U. S. 716, and *Gerende v. Board of Supervisors*, 341 U. S. 56, in contrast with the principles announced in *Wieman v. Updegraff*, 344 U. S. 183, *Slochower v. Board of Higher Education*, 350 U. S. 551, rehearing denied, 351 U. S. 944, and *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, had at least established that the lawful associations of public employees could not be made the basis for their dismissal without certain prerequisites if due process was to be served. The concept of "scienter" introduced in these cases at least gave protection to presumptively innocent association. In addition, clearly-drawn pre-existing legislation making disclosure a condition of employment added certain guaranties of fairness in the dismissal procedures.

While the instant cases were pending in this Court, five other decisions appeared to lend support to petitioners' view of the teaching of the prior decisions. They were *Konigsberg v. State Bar of California*, 353 U. S. 252, *Schware v. Board of Bar Examiners*, 353 U. S. 232, *In re Patterson*, 353 U. S. 952, *Morgan v. Ohio*, 354 U. S. 929, and *Raley v. Ohio*, 354 U. S. 929. In those cases, particularly *Konigsberg*, this Court declared it improper to draw an inference of lack of good moral character from one's colorable assertion of a constitutional right against ques-

tioning about his associations and beliefs. In addition, the *Patterson* and *Schware* decisions seem to indicate that even had there been affirmative answers to questions regarding Communist Party association, the evidence thereby disclosed would not have justified refusal of state licensing. These decisions cannot be squared with the majority and concurring opinions in *Lerner and Beilan.*

Beilan and *Lerner* have introduced an entirely new concept into the relationship between states and their employees—an obligation of frankness whose application to these cases entirely overrides previous requirements with respect to *scienter* and pre-existing disclosure statutes. This overriding obligation has been permitted to short-circuit previously established rules regarding fair warning and knowing association. Furthermore, the *Konigsberg* prohibition of improper inferences has, as though by magic, been replaced by the Court's approval of the doctrine of "equating" failure to answer with incompetency or unreliability. The consequence of these decisions is that although California may not "infer", New York and Pennsylvania may "equate". Although California's impermissible inferences did not overcome Konigsberg's attempt to prove his good moral character, nevertheless Pennsylvania's and New York's equation satisfies those states' burden of proving Beilan's and Lerner's incompetency and unreliability.

The purported distinction of *Konigsberg* is particularly perplexing. The Court says that that case "stressed the fact that the action of the State was not based on the mere refusal to answer relevant questions—rather, it was based on the inference impermissibly drawn from the refusal." This is entirely true, but the *Konigsberg* case dealt with whether the testimony of an ex-Communist about his attendance at meetings, his criticism of certain public officials and his refusal to answer questions, taken altogether, would suffice so to undermine *Konigsberg's* showing of good moral character as to disqualify him for admission to the Bar. It

seems to be hardly an appropriate distinction to say that whereas all three such things were insufficient in *Konigsberg*, one merely is enough in the present cases, not simply to cast doubt upon good moral character, but affirmatively to sustain the employer's burden of proving bad character. If this is a distinction of *Konigsberg*, we can only suggest it has swallowed the rule.

The nub of the majority opinions in both *Lerner* and *Beilan* is that refusal to answer "relevant" questions amounts to unreliability and incompetency. This reasoning is squarely contradictory to the rulings in *Wieman* and *Konigsberg*. In all four cases, the assertedly relevant questions involved lawful past associations. In *Wieman* a statute required the disclosure; that may be inferentially true of *Konigsberg*. There is no such statute involved in *Beilan* or *Lerner*.

One further consequence of these holdings opens up new dangers for public employees and their associations, that is, that in each case the Court permits state authorities deliberately to ignore other clearly applicable existing state procedures which guarantee at least fundamental fairness to the state employees. These existing statutes both in Pennsylvania and New York are now for practical purposes a dead letter. It appears to us that all of the things that have now been condemned in previous decisions are permitted in these cases simply in the name of candor and frankness.

Even *Garner* did not go this far. For in *Garner* there was a pre-existing law making the disclosure a condition of employment. In *Garner*, as interpreted by this Court and subsequently by California, the questioning was required to relate to knowing subversive association. The instant cases extend the *Garner* principle of conditioned employment beyond the necessities of any legitimate state interest and represent a far greater invasion of at least presumptively lawful association of state employees beyond the tolerance of the First and Fourteenth Amendments.

If the present decisions be regarded as a logical consequence of the *Garner* doctrine, then we suggest that that case itself needs reconsideration. In *Garner*, this Court upheld "inquiry as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are no less relevant in public employment." 341 U. S. 720.

This principle ought to be reconsidered because, we submit in all deference, it is logically unsound, unsupported by any principal of law and has had most deletrious effects upon the civil service and upon the rights of political association and privacy. It is our belief that the qualifications of public employees ought to be determined upon strictly relevant tests of their ability to perform and the actual performance of their work. See *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248; *Souder v. City of Philadelphia*, 305 Pa. 1, 156 Atl. 245; *Canteline v. McClellan*, 282 N. Y. 166. Even if inquiries beyond those matters may be treated as relevant, nevertheless such relevance must yield to the rights of privacy, of political association and of expression (*Sweezy v. New Hampshire*, 254 U. S. 234).

In addition to the confusion created on the issues of pre-existing statutes, fair procedures and scienter, as well as the erosion of previously established principles of free association and privacy, there is one further area of confusion created by the instant decisions. *Wieman* and *Joint Anti-Fascist Refugee Committee* had seemed to us to have established that discharge for refusal to answer a question relating to Communist association created a stigma of disloyalty and hence that due process required a hearing on the issue of loyalty prior to dismissal. The Court now holds that the state can avoid such requirements of due process by discharging a man for the same reasons but calling it

incompetency, unreliability or lack of candor. We doubt that the Court upon further reflection would agree with the proposition upon which these cases now stand, namely, that the use of a label can permit the State to dispense with what otherwise would be regarded as the requirements of due process.

We urge reconsideration of a doctrine whose effects are already being felt in different areas. The Coast Guard has already received judicial approval for the avoidance of the due process requirements of *Lester v. Parker*, 235 F. 2d 789 (9 Cir. 1956) by the imposition of a loyalty questionnaire upon persons seeking employment in the privately owned merchant marine (*Graham v. Richmond*, CADC No. — (Holtzoff, J., pending on appeal). The Florida Supreme Court has indicated that it is considering whether this Court's decisions herein may not justify the disbarment of a lawyer who refused to answer similar questions in the course of disciplinary proceedings (*Sheiner v. Florida*, — Fla. —). The United States Army, notwithstanding this Court's decisions in *Abramowitz v. Brucker* and *Harmon v. Brucker*, 355 U. S. 579, is employing the same questionnaire technique today.

Certainly before this Court's decisions become so fixed that they will mold judicial and administrative behavior throughout the United States with such adverse effects upon the rights of privacy and association, a full reevaluation of the legal philosophy underlying the doctrine, and its consequences, is justified in the public interest.

JOHN ROGERS CARROLL,
Counsel for Petitioner in No. 63.

LEONARD B. BOUDIN,
Counsel for Petitioner in No. 165.

August 12, 1958.

I, John Rogers Carroll, do hereby certify that I am counsel for the respondent in No. 63 and that this petition for rehearing is presented in good faith and not for delay.

JOHN ROGERS CARROLL

August 12, 1958.

I, Leonard B. Boudin, do hereby certify that I am counsel for the respondent in No. 165 and that this petition for rehearing is presented in good faith and not for delay.

LEONARD B. BOUDIN

August 12, 1958.